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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Preemption of Local Zoning Regulation)
of Satellite Earth Stations)

IB Docket No. 95-159
DA-91-577
45-DSS-MISC-93

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION

The National Association of Broadcasters ("NAB")¹ hereby submits these brief comments in reply to the Commission's Notice of Proposed Rule Making ("Notice") in the above-referenced proceeding.²

For nearly a decade, NAB consistently has urged the Commission to exercise its authority to preempt state and local regulation of communications facility siting and use when that regulation inappropriately restricts interstate communication. These past NAB recommendations and requests have taken the form of petitions and various comments filed in Commission proceedings.³

¹ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and major broadcast networks.

² Notice of Proposed Rule Making, 60 FR 28077 (May 15, 1995).

³ See e.g., NAB Reply to Comments in Support of Petition for Rule Making, in CC Docket 85-87, filed April 28, 1986; Comments (continued...)

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On July 12, 1993, in response to the Second Circuit Court of Appeals decision in Deerfield, N.Y. v. Federal Communications Commission⁴ and the petitions for declaratory ruling by Hughes Network Systems, Inc. ("Hughes") and the Satellite Broadcasting and Communications Association ("SCBA"), NAB filed lengthy comments in support of a more vigorous preemption policy regarding non-federal restrictions on the siting of not only receive-only earth stations but also broadcast and other non-broadcast communications antennas.⁵ In the instant NAB comments we again support FCC efforts to adopt a judicially-acceptable preemption policy -- in this case one addressing non-federal restrictions on the siting of receive-only earth stations.⁶

II. THE COMMISSION ENJOYS BROAD AUTHORITY TO REGULATE ELECTRONIC COMMUNICATION AND PREEMPT INCONSISTENT LOCAL REGULATION.

The U.S. Constitution grants the federal government the authority to regulate interstate commerce, including the right to

³(...continued)
of the NAB, DA 91-145, filed March 15, 1991; Comments of NAB, 45-DSS-MISC-93, filed July 12, 1993; Electromagnetic Energy Association ("EEA") Petition for Rule Making, filed December 22, 1994; EEA Reply Comments in Support of Cellular Telecommunications Industry Association ("CTIA") Petition for Rule Making, RM-8577, filed March 6, 1995.

⁴ 992 F.2d 420 (2nd Cir. 1993).

⁵ See Comments of NAB, 45-DSS-MISC-93, supra note 3.

⁶ In its proposed revisions to the receive-only earth station preemption policy rejected by the Deerfield court the Commission wisely has decided to remove the "exhaustion" and "differentiation" aspects of its policy. NAB had urged these changes years ago in comments to the Commission. See Comments of NAB in Docket 91-145, supra note 3.

preempt state and local laws which unreasonably interfere with that commerce.⁷ The Communications Act of 1934 established the Federal Communications Commission to regulate "interstate and foreign commerce in communication by wire and radio so as to make available ... to all the people of the United States, a rapid, efficient Nation-wide and world-wide ... radio communication system at reasonable charges."⁸ The Commission clearly enjoys the authority to preempt state and local regulation which would effectively "un-license" federally-licensed facilities, and has used that authority in the past.⁹

In its Notice¹⁰ the Commission declines to expand the scope of this proceeding to encompass the broader preemption policy urged by NAB and others. Indeed, the Commission's Notice, although adopted in April of 1995, fails to acknowledge two major petitions, dealing with federal preemption, filed in December of 1994.

⁷ The Commerce Clause of the United States Constitution provides for the regulation of commerce among the several states. U.S. Const., art. I, §8, cl. 3.

⁸ 47 U.S.C. § 151.

⁹ A good example of the Commission exercising its power to preempt local ordinances which inhibit interstate communications may be found in the area of amateur radio facilities. Order in Docket No. PRB-1, 101 F.C.C.2d 952 (1985). There the Commission restricted nonfederal regulation of placement, screening or height of amateur antennas.

¹⁰Notice, supra note 2, at ¶¶ 74-75.

EEA, of which NAB is a member, filed a petition¹¹ requesting that state regulations be preempted where they conflict with the Commission's radiofrequency (RF) standards. EEA warned that state and local RF restrictions inconsistent with federal standards would unduly burden the development of Advanced Television, Personal Communications Services and other emerging technologies, let alone conventional communications technologies.

CTIA, in its petition,¹² asked the Commission to preempt state and local regulation of tower sites where that regulation would effectively shut down commercial mobile radio services. According to CTIA, the Commission's failure to exercise its preemption authority is creating unnecessary delay in developing mobile communications services and is resulting in additional costs to providers, which, in turn, are passed on to the consumer.

Although the Commission may not be inclined to address, in the instant proceeding, a more global approach to federal preemption, the need for it to do so is growing at a geometric pace.

III. THE COMMISSION SHOULD ADOPT A BROADER APPROACH TO FEDERAL PREEMPTION.

As set forth in, for example, the above-referenced EEA and CTIA petitions, the need to ensure the effective and prompt

¹¹ EEA petition, supra note 3.

¹² CTIA petition, supra note 3.

inauguration of new communications technologies, coupled with the increase in the difficulties of siting current-technology facilities, strongly support Commission adoption of a federal preemption policy that will encompass all users of the spectrum.

Indeed, FCC Chairman Reed Hundt himself has acknowledged the logic of a general policy of preemption for all communications technologies. The Chairman offered his view in response to a question addressed to him during an April 11, 1995, session at the NAB '95 Convention in Las Vegas, Nevada:

Q: Mr. Chairman [you've been quoted as saying that] you want the digital age to bring the elimination of barriers to open markets and the power to pre-empt state and local regulations that may interfere with competition. Would that include, in your perception, local zoning boards that don't want stations to construct towers and satellite dishes?

Hundt: We already have initiated measures with respect to the PCS industry, the industry that is springing up in the wake of the auctions that we just conducted, to make sure that that industry will not be impeded by any inappropriate or irrational local zoning ordinances. *Anybody else who uses the airwaves, it seems to me, ought to be talking to us about the exact same issues. I don't think there's any reason to have a distinction between one kind of airwave-based business and another airwave-based business* (emphasis added).

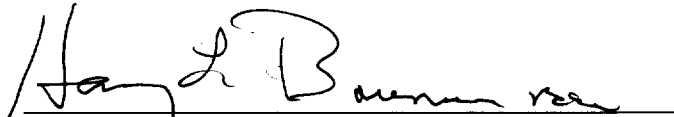
NAB agrees with Chairman Hundt that "inappropriate or irrational" ordinances, regardless of the type of technology involved, should not be allowed to impede the free use of that technology when the Commission's rules would otherwise permit it. Proceedings should be initiated promptly to address the concerns of the Chairman, broadcasters and other communications entities.

IV. CONCLUSION

Thus, while NAB supports further efforts, in this proceeding, to develop a service-specific but judicially-sustainable approach to federal preemption, we recommend that the Commission promptly initiate, as urged in petitions currently on file at the agency, a larger proceeding that will confront -- finally -- the need for a preemption policy that generally will ensure full use of federally-licensed communications facilities.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Henry L. Baumann", written over a horizontal line.

Henry L. Baumann
Executive Vice President and
General Counsel

A handwritten signature in cursive script, appearing to read "Barry D. Umansky", written over a horizontal line.

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July 14, 1995